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Supreme Court of the United States

October Term, 1958

No. 871.

AMERICAN EXPORT LINES, INC.,
Petitioner,

against

GULF ITALIA COMPANY,
Respondent.

BRIEF FOR RESPONDENT, GULF ITALIA COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The questions of law urged as reasons for granting of the writ as set out in the petition simply do not exist. We urge denial of the writ because only a question of fact is involved which was found in favor of respondent by both courts below.

ARGUMENT

This Case is Essentially One of Fact and is Not a Case for Review by this Court

Petitioner damaged respondent's tractor during discharge from the SS EXIRIA at Palermo, Italy on September 6, 1954. The tractor had been shipped to seaboard from Pittsburgh by Gulf Oil Corporation, as respondent's agent. Gulf had purchased it from Beckwith Machinery Company, and thereafter sent Beckwith its printed form of shipping instructions requesting that the shipment be "packed se-

curely for export, each Box, Crate, Bundle, Piece to be marked: AIF & PCO, Palermo, Sicily, 739" (Petitioner's Appendix, p. 13a). The railroad accepted and transported the tractor to New York as "1 D-8 tractor", and so described it on its bill of lading and arrival notice (Appendix, p. 12a). Gulf's forwarding agent at New York prepared the ocean bill of lading describing the tractor as a "piece", but *petitioner's* receiving clerk changed it to "semi-boxed" (Appendix, p. 12a and 13a).

Respondent paid the only tariff rate provided for a "semi-boxed tractor", and the tariff did not provide any rate for a semi-boxed tractor shipped "unpacked". Petitioner's bill of lading did not define either "pieces" or "semi-boxed" articles as packages. It did state that the value of the goods should be deemed to be, for purposes of claim, "$500 per package or per unit on which basis the freight is adjusted" (Appendix, p. 41a). Respondent was charged and paid freight based upon the freight unit of measurement tons.

The District Court (Cashin, J.) held that the case turned on "one basic issue" of fact, viz., whether the tractor was a "package" under the Carriage of Goods by Sea Act (Appendix, p. 3a). The Court found that:

> "The tractor was prepared for shipment by putting waterproof papering about some of the more vital parts of the superstructure and by partially encasing the superstructure with wooden planking. The tread portion of the tractor was not prepared for shipment in any way, nor was the tractor attached to a skid." (Appendix, pp. 2a-3a)

The District Court therefore applied the $500 freight unit limit to the 34.6 units of measurement tons upon which the freight charges were based, thus limiting petitioner's liability for respondent's $18,275.64 loss to $17,300.

The Court of Appeals agreed with the District Court's finding that the tractor was not a package and sustained

application of the limitation to the tariff freight unit of measurement tons.

Both courts decided the case as one of fact and we submit that no question of law of general application has been or can be presented on the record to which the petitioner asks this Court to direct its writ.

The Reasons Asserted by Petitioner for Granting the Writ Are Not Valid

As to the claimed important question of construction and application of Section 4(5) of the United States Carriage of Goods by Sea Act.

The narrow question of fact whether a "semi-boxed" tractor is a package is not of sufficient importance to provide a reason for granting the writ.

If, as petitioner now contends (p. 6), the question really is "Who is to buy the insurance above the $500 limitation," the petition must, we submit, be denied because the record contains nothing on the subject of insurance, and respondent was in fact uninsured.

Respondent was not called upon to declare a valuation in excess of $500, because the tractor was not a package.

Respondent did not know that petitioner was claiming that the tractor was a package.

Neither the tariff nor the bill of lading stated that "semi-boxed" goods were subject to a $500 "package" limitation, and respondent was charged and paid the only tariff rate for a "semi-boxed tractor".

We know of no confusion generated by the concurrent findings of the courts below that respondent's tractor was not a package. Had petitioner desired to apply a $500 limitation to the tractor, it could have provided in its tariff

a flat charge per tractor. *Petition of Isbrandtsen Co., Inc.*, 201 F. 2d 281, 286 (2d Cir., 1953). But petitioner could not change the character of respondent's cargo as a tractor by attaching the confusing label "semi-boxed", and by such device limit its liability to $500.

As to the contention that the meaning given by the courts below the words "package" and "customary freight unit" has left the intent and meaning of the limitation clause in a state of uncertainty and confusion.

Respondent has never contended, and the courts below did not hold, that an item of cargo cannot be regarded as a package unless fully enclosed. Both courts did reject the argument made by petitioner that any preparation of the goods for ocean transportation required a finding that the item in question was a "package".

The District Court stated that this tractor would not be regarded as a package under any ordinary construction of the term, because

> "A large tractor, weighing 43,319 pounds, is not within the purview of the layman's view of a 'package'." (Appendix, 6a)

The District Court took into consideration the purpose of the package limitation—to protect common carriers from unexpectedly sizeable risks in transporting parcels containing articles of great value, 4 Halsbury, The Laws of England, p. 21; *White* v. *The Lancashire & Yorkshire Railway Company* (1874) L. R. 9 Exch. 67, 70; *Stirnimann* v. *The San Diego*, 148 F. 2d 141 (2d Cir., 1945), and found nothing in the historical purpose requiring it to adopt a meaning of the word "package" other than that commonly understood.

This case is not contrary to other decisions in the Second Circuit or the controlling decisions in any other Circuit. It has never been held that a "semi-boxed" tractor is a package. We know of no decision or statement of any court supporting the position of petitioner that goods must

be considered not shipped in packages only when completely uncovered. A number of cases have held goods not to be packages even where the shippers made substantial efforts to prepare them for ocean shipment.

In *Stirnimann* v. *The San Diego, supra*, 148 F. 2d 141 (2d Cir., 1945), a giant amusement crane was prepared for shipment by disassembling it into 126 parts. The Court of Appeals said, at page 143, that

> "• • • the crane was hardly to be regarded as shipped in packages"

although it is clear from the District Court's opinion (55 F. Supp. 798) that some parts of the crane were crated.

In *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 487 (S. D. N. Y., 1949), 5 of 21 component parts of a rock crusher "knocked down" for shipment were held to be packages, not because of their preparation for shipment, but because they were shipped on skids, to which the machinery parts had been securely bolted.

In *Peter Pannell* v. *United States Lines*, 263 F. 2d 497 (2d Cir., 1959), the Court of Appeals held that a yacht shipped on deck should in that case be regarded as a package because the Carriage of Goods by Sea Act by its terms does not apply to on-deck shipments and because that carrier's bill of lading, *unlike petitioner's*, specified that every piece or article shipped should be regarded as a package.

The courts having held that certain cargoes prepared for shipment were not considered shipped in packages, other items of machinery or pieces of cargo in no way prepared for shipment even more clearly were considered not shipped in packages. *Studebaker Distributors, Ltd.* v. *Charlton S.S. Co., Ltd.* [1938] 1 K. B. 459 (unboxed automobiles); *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*, 155 F. 2d 687 (5th Cir., 1946), cert. den. 329 U. S. 761 (pieces of steel), and unboxed

tractors in *Middle East Agency* v. *The John B. Waterman*, *supra*, 86 F. Supp. 487. The courts were asked to decide only the cases before them on the issues of fact there presented, and they in no way support petitioner's contention that any covering on cargo requires a holding that such cargo is a "package" within the Act.

No plain meaning of the statute has been violated. Whatever confusion may be claimed to exist must relate to the carrier's anomalous description of respondent's tractor as "semi-boxed".

As to the alleged erroneous application of the "bulk cargo rule of The Bill".

In the District Court, petitioner did not make the argument that the "customary freight unit" meant the "shipping" unit, but was content there to have the case decided on what the court found was the sole issue, one of fact, whether the tractor was a "package".

It has generally been considered that the "customary freight unit" in the Act means the unit of cargo upon which the charge for freight is computed and not the cargo itself. *The Bill*, 55 F. Supp. 780, 783 (D. C. Md., 1944), aff'd per curiam 145 F. 2d 470 (4th Cir., 1944); *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*, *supra*, 155 F. 2d 687, 693 (5th Cir., 19[illegible], cert. den. 329 U. S. 761; *Petition of Isbrandtsen Co., Inc.*, *supra*, 201 F. 2d 281, 286 (2d Cir., 1953).

The sole contrary decision is that of the District Court for the Eastern District of Louisiana in *Texas Petroleum Company* v. *The Margaret Lykes*, 57 F. Supp. 466 (1944). The District Court for the Southern District of New York specifically rejected *The Margaret Lykes* on the point in *Middle East Agency* v. *The John B. Waterman*, 86 F. Supp. 486, 487, 491 (1949), and *The Margaret Lykes* is contrary to the decision of the 5th Circuit in *Waterman Steamship Corp.* v. *United States Smelting, Refining & Mining Co.*,

155 F. 2d 687 (1946), cert. den. 329 U. S. 761, to the decision of the Second Circuit in *Stirnimann* v. *The San Diego*, 148 F. 2d 141 (1945), and to the statement of the Second Circuit as to the authorities' construction of the term "freight unit" in *Petition of Isbrandtsen Company, Inc.*, 201 F. 2d 281, 286 (1953).

We have never before heard of the "bulk cargo rule of *The Bill*".

Petitioner's own bill of lading specifies that the customary freight unit is the "unit on which basis the freight is adjusted". (Appendix, 41a, Clause 17) There could not be a more unsuitable case in which to ask this Court to grant its writ for the purpose of determining that the "freight unit" means the goods themselves.

Nothing is added by the statement of Judge Hough that "unit" in the original text of the Hague Rules meant the same as "customary freight unit". This experienced admiralty lawyer and jurist could not have been unaware that "freight" in maritime commerce means compensation for carriage of goods, not the goods themselves. Benedict, *On Admiralty*, 6th Ed., Vol. 1, Sec. 92, page 284; Carver, *On Carriage of Goods by Sea*, 9th Ed., p. 809. Judge Hough showed his appreciation of the distinction between "freight" and "goods" in his opinion in *Aktieselskabet Brausgaard* v. *Standard Oil Co. of New Jersey*, 283 Fed. 106 (C. C. A. 2, 1922), when he described the compensation for ocean carriage of goods as "freight money" (107). When referring in 1927 to the text of the 1922 Brussels Convention, he plainly meant that "freight unit" was the unit of measurement of the cargo to which the freight applied.

The history of Section 4(5) of the Act supports the conclusion below that "customary freight unit" means the measurement unit of the cargo upon which the freight is based, and not the cargo itself. As Chestnut, J., said in *The Bill*, *supra*, 55 F. Supp. 780 (D. C. Md., 1944), aff'd per curiam, 145 F. 2d 470 (4th Cir., 1944):

> "Upon consideration of this hitherto unadjudicated point, I conclude that the phrase 'per customary freight unit' in this context in the light of its legislative history, refers to the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged. Generally, in marine contracts the word 'freight' is used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves. Benedict on Admiralty, Vol. I, 6th Ed., § 92, p. 284; Carver on Carriage of Goods by Sea, 8th Ed., § 543, p. 755; Richards on Insurance, 4th Ed., § 424, p. 765" (783).

The argument that respondent's tractor was itself the "customary *shipping* unit" to which the $500 limitation should apply is unsupported by any evidence in the record, is contrary to the authorities, is inconsistent with the terms of petitioner's bill of lading and the established meaning of "freight" in marine commerce. Moreover, the record does not contain the essential facts upon which a redetermination of the now clearly established meaning of "customary freight unit" can be made.

As concerns petitioner's contention that respondent should have been estopped from asserting a higher value after it had accepted the benefit of "the lower rate which was dependent upon the specified $500 limitation".

The point heading on page 15 of the Petition implies that the estoppel argument is based upon decisions of this Court. Certainly no estoppel argument can be supported by the facts in this case. The tariff provided no "lower rate" for tractors shipped "unpacked". Petitioner's own receiving clerk changed Gulf's description of the cargo from "piece" to "semi-boxed", and respondent was charged and paid the only tariff rate provided for a "semi-boxed" tractor. The bill of lading applied the $500 limitation uniformly to packages or customary freight units. Petitioner's liability, under its bill of lading, would have

been limited to $500 only if the tractor was a package. Petitioner is guilty of "boot-straps" reasoning, because the estoppel argument can be made only if the tractor was a package. The courts below have found that it was not.

We have no quarrel with the cases cited by petitioner under this heading, but they have no application to this case.

In *Hart* v. *Pennsylvania Railroad Co.*, 112 U. S. 331 (1884), a shipper and rail carrier agreed upon a valuation for a shipment of horses. There was no agreed valuation in the present case apart from that provided in Clause 17 of petitioner's bill of lading, that "• • • the value of the goods shall be deemed to be $500 per package or per unit on which basis the freight is adjusted • • •." Respondent is not contending that there is anything improper about a reasonable and fully understood agreement as to valuation of goods.

In *Adams Express Co.* v. *Croninger*, 226 U. S. 491 (1913), this Court sustained what it termed a fair, reasonable and just agreement as to the valuation of goods. That shipment was received and transported under an agreement specifying that the value of the property shipped

> "• • • is not more than fifty dollars, unless a greater value is stated herein • • •" (508).

In *The Kensington*, 183 U. S. 263 (1902), a baggage valuation provision in a passage contract was held void because unaccompanied by a right to increase the amount by proportional payment. In that case there was no doubt that the limitation applies to the baggage, and that the passenger and the carrier so agreed.

In *U. S. Willow Furniture Co.* v. *La Compagnie Générale Transatlantique*, 271 Fed. 184 (C. C. A. 2, 1921), the Court of Appeals apparently accepted without deciding that the carrier could limit its liability to the invoice value of the goods at port of shipment plus ocean freight. That question is not presented here.

In *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317 (1921), the shipper and carrier had agreed to a $100 per package valuation in respect of goods shipped by rail. There was no question but that the consignment, consisting of 56 cases, was made up of packages. The Court sustained the bill of lading valuation of the goods. We are not contending here, had the tractor been a package, that the $500 limitation would not have applied.

In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639 (1913), a shipper declared to a railroad a low valuation of his shipment to obtain a low freight rate. This Court held that the shipper was bound by the valuation declared, and we agree that he should have been. In this case, however, respondent declared no valuation, but was content with the application of the $500 limit to the freight units of measurement tons.

None of petitioner's authorities can provide a factual basis for an estoppel argument entirely lacking in the record.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
May 25, 1959

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